

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:
Preserving the Open Internet
Broadband Industry Practices – Further
Inquiry into Two Under-Developed
Issues in the Open Internet Proceeding

GN No. 09-191

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**REPLY COMMENTS
OF THE
CALIFORNIA CONSUMERS FOR NET NEUTRALITY**

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The California Consumers for Net Neutrality (CCNN) submit these reply comments in response to the Federal Communications Commission's (FCC or Commission) *Further Inquiry into Two Underdeveloped Issues in the Open Internet*.

CCNN is a newly formed California consumer protection group focused on issues related to Net Neutrality. CCNN has members throughout the state. CCNN's interest in this proceeding derives from its belief that regulation of Net Neutrality by the FCC is essential to preserve both our democracy and the freedom of speech.

I. INTRODUCTION

On September 1, 2010, the FCC released a Notice seeking additional comments in the *Notice of Proposed Rulemaking in the Matter of Preserving the Open Internet* (Further Inquiry). The FCC found that "two complex issues" merited further inquiry. The first of these issues relates to what the relationship between Internet access service and specialized or managed services that are provided over the same "last-mile facilities" should be. The second group of issues relates to whether broadband access and openness principles should apply to wireless providers.¹

The Commission is concerned that specialized services will be deployed to bypass Open Internet protections and that such services could displace Open Internet access by becoming the focus of deployment. As the FCC put it, specialized services may come "to serve as substitutes for delivery of content, application, and services over broadband

¹ *Further Inquiry into Two Under-Developed Issues in the Open Internet Proceeding*, September 10, 2010.

Internet access service,” with the risk that the Open Internet “may wither as an open platform for competition, innovation and free expression”.²

Finally, the Commission noted the possibility that specialized or managed services could mask anti-competitive conduct where Internet access providers are vertically integrated corporations providing their own content, application, or services, or have tying arrangements with third-party providers of content, application and services. The Commission is also questioning whether wireless providers business plans would wall off wireless from Open Internet protections. With regard to wireless, the FCC seeks comments on transparency, device interoperability, and application availability.³

II. DISCUSSION

The CCNN strongly supports the FCC’s six rules supporting Net Neutrality as an appropriate regulatory response to potential restrictions of the freedom of the Internet for narrow economic self interest of the carriers. CCNN believes that these Rules are rooted in “consumer protection” concerns which grant consumers a right to access content and applications of their choice. CCNN further believes that all of Six Net Neutrality rules be applied by the Commission in this phase of the proceeding with respect to both wireline and wireless and managed or specialized services.

A. Specialized Services

CCNN agrees with the Center for Democracy and Technology’s (CDJ) Opening Comments stating that the Commission’s approach to “specialized” services should

² *Id.*, p.2.

³ *Id.*, pp. 4-6.

reflect the “principle that network operators be given the leeway to experiment with service offerings that are not Internet access, so long as such services do not impair the robustness, availability, or openness of the operators’ Internet access offerings.”⁴ Thus, specialized services should be a compliment *to* rather than a substitute *for* a network open access.

Above all, the Open Internet rules are designed to protect consumers, first and foremost, by making access free of discrimination and unbound by the business priorities ISPs might otherwise impose as they attempt to monetize their control of access.⁵ More specifically, CCNN agrees with CDT that from a functional standpoint specialized services must serve a specific and limited purpose so as not to allow network operators to easily evade “open Internet rules”. These operators could offer something that gives consumers the most popular capabilities of the Internet and labeling it a “specialized service” and hence exempting it from the open Internet rules.”⁶

Thus we agree with CDT that the definition of “specialized services require that the service not be “*intended, marked, or widely used as a substitute for broadband Internet access, either individually or together with other [specialized service]s offered by the provider.*”⁷ Further we agree with CDT’s suggested definition that the specialized services be “*allocated bandwidth on last-mile transmission facilities that is separate from bandwidth allocated to broadband Internet access service, such that usage*

⁴ CDT Comments, October 12, 2010, p. 1.

⁵ *Id.*

⁶ *Id.*, p. 2.

⁷ *Id.*, p. 1.

*spikes for the specialized service do not affect the amount of last-mile bandwidth available for broadband Internet access service.”*⁸

Finally a definition of specialized services should include “*receives priority over Internet access traffic on last-mile transmission facilities, if at all, only in a manner designed to ensure that a robust amount of bandwidth remains available for Internet access traffic even during periods of heavy usage.*”⁹ While it is clear what specialized service must “*not*” be, it is unclear what specialized services might be, or even what parties calling for recognition of these services intend them to be. For these reasons, CCNN agrees with the Public Interest Commentators (PIC) that “the Commission should conclude the instant proceeding by adopting robust Open Internet rules, and then only consider the question of specialized services in a subsequent phase of this proceeding.

Finally, the FCC should require an analysis be done of what impact the offering of specialized services is having on the robustness of broadband Internet access offering.

B. The Commission Must Apply the Same Open Internet Principles to Wired and Wireless Networks.

While there are technical differences between mobile wireless and wireline services, the proposed Open Internet rules can be applied to accommodate those differences because the criteria of nondiscrimination and transparency, in addition to the original four principles, are platform neutral. While wireless carriers must be afforded the flexibility to deal with managing their networks efficiently for all users of those

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Id.

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Id., p. 2.

networks, no definition of “reasonable” should include management that is anti-competitive or lacks transparency.

The six draft rules proposed by the FCC should become the criteria for assessing what is reasonable for wireless carriers. Reasonable network management must include providing access to and transmission of lawful content, the ability of content providers to run lawful applications and consumers to use lawful devices, the ability for consumers to make competitive choices among providers, applications, sources of content and types of services, in a nondiscriminatory manner.¹⁰

We agree with the CDT that the Commission “needs to ensure that specialized services are not delivered in a manner that threatens the technical operation of best-effort Internet services.”¹¹ CCNN also agrees with CDT that it is important that the bandwidth for specialized services does not compromise the bandwidth which is available to retail customers of broadband Internet access. Further, the bandwidth for specialized services should be a “special” bandwidth, separate from that given to broadband Internet access service.¹²

As Netflix notes,

“... the risks posed by specialized services being provided over the same physical network as the public Internet heightens the need for oversight of such services. The Commission must assure that specialized services do not, in effect, transform the public Internet into a private network in which access is not open but is controlled by the network

¹⁰ As CDT notes in its Comments (at p. 5), “There is simply no basis for the assertion that wireless providers would need to discriminate among traffic based on content-based factors such as its source, ownership, or application.” Further, as CDT notes (at p. 6), “In the absence of rules to the contrary, it appears that picking and choosing among Internet applications and forcing online service providers to negotiate for permission or approval of carriers is exactly what mobile wireless operators envision.”

¹¹ *Id.*, p. 2.

¹² *Id.*

operator, and innovative Internet-based enterprises are permitted effective access to their consumers only if the enterprises pay network operators unreasonable fees or are otherwise seen by such network operators as not threatening a competitive venture.¹³

These strictures regarding specialized services and reasonable network management would apply to both wireline and wireless networks.¹⁴ As Professors Jordan & Shaffer note, “Consumers expect to use the device of their choosing and to download applications, as well as to view the same legal content they access on a PC.”¹⁵ They add, “Within a short time, the typical consumer may not even distinguish between ‘online,’ ‘cell phone,’ telephone,’ and ‘cable’” as far as Internet access is concerned.¹⁶

C. Jurisdictional Authority

Some parties have questioned the Commission’s jurisdictional authority to determine these rules and enforce them once they are in place.¹⁷ The CCNN supports the legality of the FCC’s jurisdiction, both to adopt and enforce net neutrality rules for wireline and wireless providers of Internet access under Title II of the Communications Act.

¹³ Comments of Netflix, October 12, p. 2.

¹⁴ See Comments of Time Warner Cable, p. 35; Comments of the National Cable & Telecommunications Association (NCTA), p. 11 (“... if any such [net neutrality] rules are adopted for broadband Internet access, specialized services, or both, they must be applied in a competitively neutral manner to all broadband platforms, wireline and wireless”); Comments of Surewest, p. 18 (if the FCC acts, “it must do so on a technology-neutral basis”).

¹⁵ Comments of Scott Jordan, Ph.D. and Gwen Shaffer, Ph.D. Department of Computer Science University of California, Irvine, October 12, 2010, p. 18.

¹⁶ *Id.*, pp. 18-19.

¹⁷ See Comments of Wireless Communications Association International (at p. 32), Verizon and Verizon Wireless (at p. 65.) and Surewest (at p. 18).

III. CONCLUSION

For all of the foregoing reasons, CCNN urges the Commission to take action consistent with the foregoing comments.

Respectfully submitted,

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